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FILED
JUL 21 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No 206.

JACKSONVILLE TERMINAL COMPANY, a corporation, ATLANTIC COAST LINE RAILROAD COMPANY, a corporation, and SEABOARD AIR LINE RAILROAD COMPANY, a corporation,

Petitioners,

vs.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION.

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BRIEF IN OPPOSITION.

Question Presented:

Whether the United States district court has jurisdiction of the subject matter of respondent's complaint.

Statutes Involved.

The relevant provisions of section 5(2)(a) of the Interstate Commerce Act are:

> "It shall be lawful, with the approval and authorization of the Commission . . .
>
> "(i) . . . for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate

the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . . or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

Title 49 U. S. C. 5(2)(a).

Although it is not mentioned in the petition for writ of certiorari, section 5(4) of the Interstate Commerce Act is directly involved in this litigation. It provides, in pertinent part:

"It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. . . . As used in this paragraph and paragraph (5) of this section, the words 'control or management' shall be construed to include the power to exercise control or management."

Title 49 U. S. C. 5(4).

Statement.*

Alleging in its complaint (R. 2) that its action arises under the Interstate Commerce Act and thus within the jurisdiction of a federal court, plaintiff and respondent Florida East Coast Railway Company prayed for injunctive relief and a money decree against Jacksonville Terminal Company, owner and operator of Jacksonville's railroad terminal facilities, and against Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company, who with Southern Railway Company, Georgia Southern and Florida Railway Company and F. E. C. jointly own Jacksonville Terminal Company and jointly control its affairs under an Operating and Guaranty Agreement between the parties dated December 1, 1947.

Article Twenty-first of the Operating and Guaranty Agreement is alleged (R. 5) and is shown (R. 41) to provide in part:

> "... that the President or General Manager [of Terminal Company], or any other officer subject to election by the Board of Directors of the Terminal Company shall be appointed and serve only by unanimous consent of the Guarantor Companies and shall (any provision of the by-laws of the Terminal Company to the contrary notwithstanding) be dismissed upon the written request of any one of the Railway Companies, and ... the dismissal of any subordinate official of the Terminal Company shall be made by the President or the General Manager upon the written request of any one of the Railway Companies."

* This statement of the case is substantially that which was adopted by the court of appeals in its opinion (R. 88-90; A. 17-19).

F. E. C. charges by its complaint that on February 8, 1963, F. E. C. made an appropriate written request, pursuant to Article Twenty-first of the Agreement, for the immediate dismissal of M. C. Jennette as President and General Manager and of Elliott Adams as General Counsel of Terminal Company and that, by reason of the Agreement, by reason of the Interstate Commerce Commission's order authorizing and approving the Agreement and the transaction reflected thereby, and by reason of Title 49 United States Code, Section 5, it became and was the duty of each defendant (a) to honor and enforce F. E. C.'s request and (b) not to enter into any transaction to acquire or maintain the power to control, directly or indirectly, Terminal Company's organization or operation and not to participate in accomplishing control of Terminal Company's organization in a common interest with any other defendant in any manner whatsoever, except in accordance with the Operating and Guaranty Agreement or otherwise with the prior approval and authorization of the Interstate Commerce Commission.

F. E. C.'s claim for relief is that Terminal Company, Coast Line and Seaboard have refused to honor F. E. C.'s said request and have frustrated F. E. C.'s right effectively to object to the continued service of the two Terminal Company officials.* F. E. C. alleges in terms that Terminal Company, Coast Line and Seaboard have thereby ousted F. E. C. from its right to maintain jointly with the other

* The complaint (R. 7) asserts not only that Coast Line and Seaboard "insisted that they would take no action to honor and enforce" F. E. C.'s request, as pointed out by petitioners (petition, p. 5), but also that Coast Line and Seaboard induced the Terminal Company directors serving by their designation to defeat a motion to vacate the questioned offices, thereby perpetuating Jennette and Adams in their respective offices against the wishes of F. E. C. and of defendant Southern (R. 7).

owners the power to control the Terminal Company's organization and operation and that those defendants have acquired that power for themselves, in violation of (a) the Operating and Guaranty Agreement, which was created under the aegis of federal law to govern the affairs of Terminal Company in a way consistent with the law; and (b) the Interstate Commerce Act, which makes unlawful [Title 49 U. S. C., Section 5(4)] the acquisition of such power without the approval and authorization of the Interstate Commerce Commission.

On motions by Coast Line, Seaboard and Terminal Company, the district court dismissed the complaint and F. E. C.'s action for lack of jurisdiction. On F. E. C.'s appeal, the court of appeals held that the district court had power to determine the controversy, reversed the case and remanded it for further proceedings. By their petition for writ of certiorari, Coast Line, Seaboard and Terminal Company assert that the decision of the court of appeals conflicts with applicable decisions of this Court and of other courts of appeals.*

Argument.

The court of appeals properly held that federal jurisdiction of this litigation is founded on two independent grounds: (a) the Operating and Guaranty Agreement and F. E. C.'s alleged right under Article Twenty-first jointly to exercise power to control Terminal Company's organization and operation are creations of the Interstate Commerce Act and must be interpreted and enforced consistently

* Although Southern Railway Company and Georgia Southern and Florida Railway Company are parties defendant and supported F. E. C.'s position before the court of appeals as parties appellee, petitioners have not named Southern and Georgia Southern as respondents to the petition for certiorari.

with the policy of the Act; and (b) F. E. C. makes a substantial allegation that Coast Line and Seaboard have undertaken to acquire or maintain the power to control Terminal Company in a way not authorized by the Interstate Commerce Commission pursuant to Section 5(2) of the Act, in violation of Section 5(4).

Petitioners assert the existence of an abstract conflict between decisions which, even if it existed, could not be resolved in such a way as to affect the district court's duty on independent jurisdictional grounds to determine the controversy. Moreover, the interlocutory decision below is correct. It is in harmony with this Court's decision in *International Association of Machinists, AFL-CIO* v. *Central Airlines, Inc.*, 372 U. S. 682, and it does not conflict with any decision of this or any other court. The case is therefore not one in which it is appropriate to grant the writ.

I.

It is inappropriate to review the matter presented because the decision below is not final and because review would not affect the district court's power and duty to determine the controversy.

The decision sought to be reviewed is an interlocutory and not a final decision, a fact that "of itself alone" furnishes "sufficient ground for the denial" of the writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258.

This case is not, as petitioners claim (petition, p. 7), one of those exceptional litigations in which review of an interlocutory decision "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct

of the cause." *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 384. While the question of federal jurisdiction ordinarily may properly be characterized as "fundamental to the further conduct of the case" [*United States* v. *General Motors Corp.*, 323 U. S. 373, 377; *Land* v. *Dollar*, 330 U. S. 731, 734], review of the question posed by petitioners could not affect the district court's jurisdiction of this controversy.

Petitioners have concentrated their attack on that aspect of the decision below in which the court, applying the principle of *International Association of Machinists, AFL-CIO* v. *Central Airlines, Inc.*, 372 U. S. 682, held that the asserted contractual rights depend for their existence on the effect of the Interstate Commerce Act and that, under the circumstances,

> "the contract which was authorized by federal statute and made legal only because of the federal statute may be construed by the federal court upon application of the plaintiff." R. 92; A. 21.

Petitioners have omitted from their petition all but the most casual reference (p. 10) to the plain allegations of the complaint that petitioners

> "entered into a transaction to acquire, maintain or exercise control or the power to control, directly or indirectly, the organization or operation of defendant Terminal Company, and participated in accomplishing or effectuating the control or management of the organization or operation of defendant Terminal Company in a common interest with defendants Coast Line and Seaboard, *in violation of Title 49 United States Code, Section 5(4)*. . . ." R. 7 (emphasis added).

The court of appeals held in this case that the quoted allegation constitutes "more than a merely colorable contention by appellant that the conduct of the appellees violates

the terms of the statute itself" (R. 92; A. 21) and independently justifies and requires the district court to exercise jurisdiction. Although petitioners remark in passing (petition, p. 10) that they do not think a violation is shown by the facts pleaded in the complaint (a matter not yet decided by the district court), the petition contains no assertion that the court below, in sustaining federal jurisdiction to resolve that controversy, rendered a decision in conflict with any decision of this or any other court. Neither does the petition assert that the court below erred in this holding. Thus, resolution of the conflict which is said to exist would not affect the district court's jurisdiction to determine whether petitioners have violated section 5(4) of the Commerce Act by "entering into a transaction to accomplish or effectuate the control or management of the Terminal Company in a manner different from that authorized by Title 29 U. S. C. A. §5(2)" [Opinion, R. 93; A. 21].

In the circumstances of this case, petitioners' claim that the decision below conflicts with other applicable decisions can be regarded as raising only an academic question that is not a proper subject of review by this Court. See *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 184.

II.

The decision below is not in conflict with the decisions of this Court and of other courts of appeal.

In determining that the district court has jurisdiction to construe and enforce Article Twenty-first of the Operating and Guaranty Agreement,

> "which was created under the aegis of federal law to govern the affairs of Terminal Company in a way consistent with the law."
>
> Opinion, R. 90; A. 19.

the court of appeals did not render a decision in conflict with this Court's decisions in *Gully v. First National Bank*, 299 U. S. 109, and the related cases cited in the petition (p. 7). Neither does the decision conflict with the cited cases of other courts of appeal (petition, pp. 10-13).

The principle of *Gully* was most recently applied by this Court in *International Association of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U. S. 682, upon which the court below properly relied in its decision (Opinion, R. 91, 32a-33a, 20-21). In that case it was shown that the Railway Labor Act, as amended to apply to airlines, dictated that the airlines' contract with their employees' union provide for establishment of a system board of adjustment for the purpose of adjusting and deciding disputes. The contract was made to so provide. Such a dispute was decided in favor of certain employees by the system board of adjustment and a neutral referee, and the employees brought suit in the district court to enforce the award. The district court, being of the view that the action arose out of the contract but not out of the Railway Labor Act, dismissed the action for lack of federal jurisdiction. The Court of Appeals for the Fifth Circuit affirmed, in *International Association of Machinists, AFL-CIO v. Central Airlines, Inc.* (5th Cir. 1961), 295 F. 2d 209, with Judge Brown dissenting. This Court, reversing, declared that

> "It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States. . . ."

372 U. S. at 691.

that the contracts and the adjustment boards thereby created

> "are creations of federal law and bound to the statute and its policy."

372 U. S. at 692;

and that the provisions of the contract in question

> "are to be judged against the Act and its purposes and enforced or invalidated in a fashion consistent with the statutory scheme."

372 U. S. at 694.

This Court concluded:

> "Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by federal law and are to be answered with due regard for the statutory scheme and purpose. To the extent that the contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement. If Central must comply, it is because federal law requires its compliance. . . . In our view the complaint in this case, for jurisdictional purposes, presented a substantial claim having its source in and arising under the Railway Labor Act and the District Court therefore has jurisdiction under 28 U. S. C. 1331 if the jurisdictional amount is satisfied and in any case under 1337. . . ."

372 U. S. at 695.

In this case, as surely as in the cited case, the contract sought to be enforced is "a creation of federal law and bound to the statute and its policy." Without the validating endorsement of the Interstate Commerce Commission, the Agreement would be a nullity and constitute a criminal transaction. Title 49 U. S. C. 5a. Whether Article

Twenty-first should be enforced according to its terms must be judged with due regard to the spirit of the Commission's order and consistently with the statutory scheme and purpose of the Interstate Commerce Act.

In the *Central Airlines* case, this Court stated that "the needs of the subject matter manifestly call for uniformity" (372 U. S. at 692). To make the enforcement of such contracts dependent on the divergent views of the legislatures and courts of 50 States would, the Court held, "aggravate the problem to an intolerable degree" (*ibid.* note 16). The Court agreed with the views expressed in the court of appeals by Judge Brown, that effective federal control should not be "precariously dependent upon the accident of diversity of citizenship" (*ibid.* note 15).

Petitioners contended before the court of appeals, in effect, "that they cannot perform the contract literally as written because of peculiarities of Florida state law" (Opinion, R. 92: A. 21). The same contention, that the case "depends for its decision upon a question of local law," is made inferentially in the petition (p. 12). While the court below held that petitioners' actual contention to this effect may not properly be considered in determining jurisdiction (opinion below, R. 92: A. 21), the mere possibility that the obligations of this federally-sponsored contract may be impaired by the "peculiarities of Florida state law" demonstrates that this controversy should be decided by a federal court, lest the prophecy of Mr. Justice White, writing for the unanimous Court in *Central Airlines*, be fulfilled:

> "If these contracts are to serve this function . . . their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act . . . if a contract were

struck down even though in furtherance of the federal scheme."

372 U. S. at 691.

The "apparent conflict" (petition, p. 7) that is said to exist between the decision below and the cited decisions of other courts of appeal (petition, pp. 10-13) is apparent only, and not real. The decision of the Court of Appeals for the Seventh Circuit in *Chicago & North Western Ry. Co. v. Toledo, Peoria & Western R. R. Co.* (7th Cir. 1963), 324 F. 2d 936, bears the closest resemblance to this controversy. In that case, although plaintiff's alleged contractual right arose from a "joint trackage agreement [which] could not have been undertaken without the approval of the Interstate Commerce Commission," the court refused to sustain federal jurisdiction. 324 F. 2d at 938. It is noteworthy that the court in that case (decided December 5, 1963, affirming the district court's decision rendered February 28, 1963), did not so much as mention this Court's decision in *Central Airlines* (decided April 15, 1963) in its opinion. But the significant difference between that case and this one—eliminating any possible conflict between the decisions—is that the plaintiff in the seventh circuit case did not and apparently was unable to make even a colorable allegation that the defendant violated the Interstate Commerce Act itself. See the district court's opinion, 217 F. Supp. 64, 68-69.

The Interstate Commerce Act is not only the source of the rights asserted by F. E. C., it is inextricably a part of the Operating and Guaranty Agreement and of this litigation. The question in controversy is whether Coast Line and Seaboard may properly effectuate a measure of control over Terminal Company's organization and operation by preventing the discharge of its president and general counsel. Such conduct, we contend, is foreclosed by Article

Twenty first of the Agreement. It is also foreclosed by section 5(4) of the Act, by which Congress proscribed what the Commission has not expressly authorized. Thus, construction of the Commerce Act is unavoidable. The court that eventually construes Article Twenty-first of the Agreement to determine the rights asserted by the complaint will necessarily and simultaneously decide what has been permitted under section 5(2) of the Act and what is still forbidden by section 5(4).

Thus, for perhaps stronger reasons than those applicable in *Central Airlines*, it is essential that this case be decided by a federal court as one arising under an "Act of Congress regulating commerce" [Tit. 28 U. S. C., Sec. 1337]. In this case, more clearly than in *Central Airlines*,

> "To the extent that the contract imposes a duty consistent with the Act to comply . . . , that duty is a federal requirement. If [Coast Line or Seaboard or Terminal Company] must comply, it is because federal law requires its compliance."
>
> 372 U. S. at 695.

Conclusion.

The writ of certiorari should be denied.

Respectfully submitted,

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